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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD LEISKE,

Defendant and Appellant.

A121402

(San Francisco County
Super. Ct. Nos. 195551 & 202334)

Appellant Edward Leiske received a six-year prison sentence after a jury found him guilty of possessing heroin for sale (Health & Saf. Code,¹ § 11351) and maintaining a place for selling or using a controlled substance (§ 11366). On appeal, he contends the trial court improperly instructed the jury that it could convict him of maintaining a place for selling or using a controlled substance on the basis of his repeated personal use of heroin at home. He also argues that sentencing him to serve a prison sentence violates the constitutional prohibition against cruel or unusual punishment in light of his dire medical condition. We reverse appellant's conviction for maintaining a place for heroin sales or use. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On June 16, 2007, three San Francisco police officers went to a hotel on Geary Street to conduct an investigative search relating to appellant, who was on probation.

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

The hotel entrance was locked and there was no desk clerk on duty to permit entry into the hotel. The officers waited outside the hotel.

A woman walked past the hotel entrance, possibly made a cell phone call, and then returned to the hotel entrance, where she was buzzed in. The woman was later identified as Summer Simpson. One of the officers followed Simpson inside the hotel and then allowed the other officers to enter.

The officers proceeded to the third floor. They waited outside a particular room for about five minutes until the door opened and Simpson exited the room. As she was leaving the room, Simpson dropped a black bundle containing a substance suspected to be heroin. One of the officers retrieved the bundle and apprehended Simpson. The other two officers entered the room, announced themselves, and displayed their badges.

Appellant was alone in the room. One of the officers saw what he suspected was heroin on a nightstand. Next to the suspected heroin was a digital scale, plastic Ziploc baggies, and a "hide-a-can." The hide-a-can had a false bottom that screwed off and allowed one to secrete valuables inside what otherwise looked like a can of STP oil treatment. The hide-a-can was open and contained heroin.

Appellant had \$65 on his person. No other money was found in the room. The officers found a bank statement and a traffic citation bearing appellant's name and the address of the hotel room. The officers found nothing to suggest Simpson lived in the room with appellant, such as female clothing or cosmetics.

A police department criminalist determined the package found on the nightstand contained 8.46 grams of heroin. The substance found in the hide-a-can was also determined to be heroin and weighed 49.74 grams, while the bundle dropped by Simpson was found to contain 1.09 grams of heroin.

In an information filed August 7, 2007, appellant was charged in count 1 with possession of heroin for sale (§ 11351) and in count 2 with maintaining a place for selling or using a controlled substance (§ 11366). The district attorney alleged in connection with count 1 that appellant possessed 14.25 grams or more of heroin, rendering him ineligible for probation or a suspended sentence. (Pen. Code, § 1203.07, subd. (a)(1).)

The information also contained an allegation that appellant had suffered a prior conviction for possession for sale of a controlled substance in May 2005, supporting the imposition of a three-year sentence enhancement under section 11370.2, subdivision (a), and rendering appellant ineligible for probation or a suspended sentence under section 11370, subdivisions (a) and (c), and Penal Code section 1203.07, subdivision (a)(11).²

At a jury trial conducted in October 2007, an inspector from the San Francisco Police Department testified as an expert on black tar heroin and the sale of heroin. He referred to the substances seized from appellant and Simpson as black tar heroin, which is a cheaper form of heroin that is commonly sold on the street. According to the inspector, a user of black tar heroin generally consumes between half a gram to two grams of heroin daily. Heroin addicts typically purchase the drug on a daily basis and buy enough for one day's use. A gram of black tar heroin costs between \$30 and \$40, whereas an ounce costs between \$300 and \$400. Based on the amount of heroin appellant possessed and the presence of a digital scale, packaging materials, and the STP hide-a-can, the officer opined that appellant possessed the drugs for sale.

Appellant testified in his own defense. He described himself as a 28-year old, long-time heroin addict who had to inject the drug into a muscle because he could no longer find a suitable vein. He used a large amount of heroin, estimated at three to four grams a day, because shooting the drug into muscle instead of directly into the bloodstream requires a larger dose to achieve the same effect. He suffered from serious health problems as a consequence of his drug use, including end-stage renal failure, anemia, and hepatitis C. He was told in March 2007 that he had six months to live if he were not placed on dialysis.

Appellant claimed to have purchased the heroin a day or so before his arrest. He purchased a large quantity because it was cheaper to buy in bulk and he intended to leave

² Penal Code section 1203.07, subdivision (a)(11) refers to a conviction for possessing cocaine base, cocaine, or methamphetamine for sale. It appears the district attorney cited subdivision (a)(11) in error and intended to cite subdivision (a)(3) of Penal Code section 1203.07, which refers to a conviction for possession of heroin for sale.

town on a camping trip. According to appellant, he had no need to sell drugs to support his habit because he inherited money from his grandmother the year before. Appellant denied selling heroin to Simpson, whom he described as a someone who had come over to check on him and help him out.

The jury convicted appellant of possession for sale of heroin and maintaining a place for selling or using heroin. However, the jury found the quantity enhancement untrue, rejecting the allegation that appellant possessed 14.25 grams or more of heroin. Appellant admitted the prior conviction allegation.

At the sentencing hearing, the court declared that appellant was ineligible for probation as a consequence of his prior conviction for possession of a controlled substance for sale. The court sentenced appellant to serve six years in state prison, composed of the three-year midterm for possession of heroin for sale, plus a three-year consecutive term for the prior conviction enhancement. The court imposed a concurrent two-year term for maintaining a place for selling or using heroin.³ Appellant timely appealed the judgment of conviction.

DISCUSSION

I. CONTINUOUS, PERSONAL USE OF HEROIN AT HOME AS BASIS FOR CONVICTION UNDER SECTION 11366

Appellant contends the court committed prejudicial error by informing the jury that personal use of heroin on a repeated basis while in one's own home constitutes a violation of section 11366. As explained below, we agree.

A. *Background*

In connection with the charge of violating section 11366, the trial court instructed the jury with CALCRIM No. 2440, as follows: "The defendant Edward Leiske is

³ In addition, the court revoked appellant's probation in case number 195551, in which appellant had been convicted in 2005 of possession for sale of a controlled substance. The court sentenced appellant to serve the midterm of three years for the 2005 conviction, to be served concurrently with the six-year sentence imposed for the 2007 offenses.

charged in Count 2 with maintaining a place for the sale or use of a controlled substance. To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant maintained a place, and two, the defendant maintained the place with the intent to sell or give away or use or allow others to use a controlled substance, specifically, heroin, on a continuous or repeated basis at that place.”

During deliberations, the court received a note from the jury questioning whether the charge of opening or maintaining a place for the sale or use of heroin is “intended to include personal use within your own home.” Over defense counsel’s objection, the trial court sent a note to the jury with the following response: “Members of the jury, yes, it can include, ‘personal use within your own home,’ if it has been proven beyond a reasonable doubt to be on a continuous or repeated basis at that place.”

The court reasoned that CALCRIM No. 2440 does not simply employ the term “use,” but instead distinguishes between an intent to “use” and an intent to “allow others to use.” (See Judicial Council of California, Criminal Jury Instructions (2006-2007) CALCRIM No. 2440.) The court interpreted this delineation between use and use by others to signify that section 11366 criminalizes not only maintenance of a place for others to use drugs but also personal use of a controlled substance within one’s home, as long as it is shown to be on a continuous and repeated basis.

B. *Interpretation of Section 11366*

Section 11366 makes it a crime to open or maintain “any place for the purpose of unlawfully selling, giving away, or using” specified controlled substances, including heroin.⁴ The elements of the offense “are that the defendant (a) opened or maintained a

⁴ Section 11366 provides in full as follows: “Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), paragraph (1) or (2) of subdivision (d), or paragraph (3) of subdivision (e) of Section 11055, or (2) which is a narcotic drug classified in Schedule III, IV, or V, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison.”

place (b) with a purpose of continuously or repeatedly using it for selling, giving away, or using a controlled substance. [Citations.]” (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 680.) The question presented here is whether an individual’s repeated personal use at home of a controlled substance specified in section 11366 constitutes a violation of that section.

In interpreting a statute, our task “is to determine the Legislature’s intent so as to effectuate the law’s purpose.” (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) “We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute’s purpose, legislative history, and public policy. [Citations.]” (*Ibid.*) “If the meaning of the statute remains unclear after examination of both the statute’s plain language and its legislative history, then we proceed cautiously to . . . apply ‘reason, practicality, and common sense to the language at hand.’ [Citation.]” (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 583.) Ultimately, we must give the words of the statute a workable and reasonable interpretation. (*Ibid.*)

In *People v. Vera* (1999) 69 Cal.App.4th 1100 (*Vera*), the court answered the statutory interpretation question we are faced with here. The court held that section 11366 does not cover “mere repeated solo use” of a controlled substance “at home.” (*Id.* at p. 1103.) In arriving at its conclusion, the court examined the meaning of “open” and “maintain.” “To ‘open’ means ‘to make available for entry’ or ‘to make accessible for a particular purpose,’ [citation] and to ‘maintain’ means ‘to continue or persevere in’ [citation]. When added to the word ‘place,’ the opening or maintaining of a place indicates the provision of such locality *to others*.” (*Ibid.*, italics added.)

The specific issue addressed by the court in *Vera* was whether section 11366 is a crime of moral turpitude, thereby permitting the fact of a prior conviction for violating section 11366 to be admitted to impeach a witness who suffered the conviction. (*Vera*, *supra*, 69 Cal.App.4th at p. 1102.) In general, mere possession or personal use of a controlled substance is not a crime of moral turpitude, whereas drug offenses involving sale or transportation or possession for sale are crimes of moral turpitude because they involve an intent to corrupt others. (*Id.* at p. 1103.) The defendant argued section 11366 is not a crime of moral turpitude because it encompasses mere personal, sequential use of a specified substance at home. (*Id.* at pp. 1102-1103.) The court disagreed, concluding that “unlike an offense of simple possession, a violation of section 11366 necessarily evidences moral turpitude because it involves the intent to corrupt others.” (*Ibid.*)

The *Vera* court’s reasoning is supported by *People v. Ferrando* (2004) 115 Cal.App.4th 917. There, the court held that a violation of section 11366 does not qualify as a “nonviolent drug possession offense” under Penal Code section 1210, subdivision (a), which allows a defendant to enter drug treatment instead of being incarcerated. The court explained that section 11366 does not describe a simple possession offense but instead is more like “commercial offenses” for which drug treatment is not a sentencing option. (*Id.* at p. 920.) Thus, like the *Vera* court, the court in *People v. Ferrando* distinguished the offense described in section 11366 from offenses involving mere possession or personal use.

The People claim the result in *Vera* is not inconsistent with its reading of section 11366, arguing that repeated use of illegal drugs in one’s own home has the potential to encourage others to join in, thus suggesting a risk of corrupting others. As an initial matter, the People’s interpretation of the statute is directly at odds with the holding in *Vera*. In addition, the case cited by the People for the notion that solo drug use at home has the potential to corrupt others does not support its position. (See *People v. Green* (1988) 200 Cal.App.3d 538, 544.) Rather, it stands for the proposition that section 11366 can be violated without selling drugs, “merely by providing a place for drug abusers to gather and share their experience.” (*Ibid.*) The court in *People v. Green* made clear that

“[c]orrupting and encouraging others by maintaining a place for drug abusers to gather and by furnishing drugs to them”—the criminal activity proscribed by section 11366—involves a criminal objective distinct from one’s own personal use of drugs. (*Ibid.*) Thus, to the extent the case is relevant, it supports the distinction between mere personal use of drugs and a violation of section 11366.

The People contend the language of section 11366 is unambiguous on its face and does not limit the term “use” to use by others. We disagree. There is plainly some ambiguity in the word “use,” when the term is viewed in isolation, as is evident from the differing interpretations offered by the parties. The People further contend the term “maintain,” meaning “to continue or persevere in,” does not necessarily require the participation of others. This term, too, is susceptible to different meanings when considered alone.

The ambiguity is dispelled when one considers the terms in context, as the *Vera* court did. The term “maintain” cannot be viewed in isolation and without reference to the term “open.” The activity that one “continues” or “perseveres in” by “maintaining” a place is the continued availability or accessibility of the place for the proscribed purposes. If the place is not “open” to others, it is no longer “maintained” for the unlawful purpose. Therefore, although the term “use” in section 11366 is not expressly confined to use by others, in context the term refers to use by persons other than or in addition to the defendant.

To the extent the statute permits more than one reasonable interpretation, other statutory aids support appellant’s approach to the issue. Case law recognizes that the terms “open” and “maintain” as used in section 11366 are technical, legal terms whose meaning is derived from similar statutory schemes originally enacted during Prohibition. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490.) “Cases construing the terms ‘maintaining’ or ‘opening’ in reference to narcotics cases rely on earlier opinions which construed those terms in statutes proscribing maintaining alcohol-related nuisances during Prohibition. These were places whose proprietors meant them to be used for consumption or sale of alcohol.” (*Ibid.*) Thus, the intent of statutes such as section

11366 was to prohibit persons from maintaining a public nuisance, such as a Prohibition-era “speakeasy” or a neighborhood drug house. An individual’s personal use of drugs at home does not give rise to the type of public nuisance the statute was designed to address.

The *Vera* court’s interpretation of section 11366 is bolstered by a common sense application of the statute. Interpreting section 11366 to encompass solo drug use at home leads to absurd results. Presumably, it is not uncommon for drug addicts to use drugs on a continuous or repeated basis in their own residence. Thus, as a practical matter, a simple possession or use offense could almost always be accompanied by a charge of maintaining a place for the purpose of using a controlled substance, as long as there is some evidence indicating the defendant consumed illegal drugs repeatedly at his or her place of residence. In addition, under the interpretation adopted by the trial court and urged by the People, a person who chooses to use illegal drugs alone at home on a repeated basis is subject to a more severe criminal sanction than a person who repeatedly uses drugs outside the home, such as on the streets or at a location maintained by someone else for the purpose of fostering drug use. There is no reason to believe the Legislature intended to attach a more severe penal consequence to the personal consumption of controlled substances at home instead of outside the home.

The People contend the legislative history of section 11366 supports the conclusion that the Legislature intended to include within the statute’s ambit the repeated, individual use of illegal drugs at home. Our review of the cited history reveals no such clearly expressed intent.

In 1972, the Legislature enacted section 11366 and repealed the statute’s predecessor, former section 11557. (Compare Stats. 1972, ch. 1407, §§ 2, 3, pp. 2986, 3019, with former § 11557, as amended by Stats. 1970, ch. 1098, § 12, pp. 1952-1953.) When former section 11557 was enacted in 1940, the statute expressly referred to other persons: “It is unlawful to open or maintain *to be resorted to by other persons* any place in which narcotics are unlawfully sold, given away, or smoked.” (Stats. 1941, 1st Ex. Sess. 1940, ch. 9, § 32, p. 23, italics added.) In 1953, the Legislature amended the

statute, including deleting the language “to be resorted to by other persons.” (Stats. 1953, ch. 1770, § 4, p. 3526.) The modified statute read: “It is unlawful to open or maintain any place for the purpose of unlawfully selling, giving away or using any narcotic.” (*Ibid.*) The Legislative Counsel summarized the 1953 statutory change as follows: “Makes it unlawful to open or maintain any place for purpose of unlawfully selling, giving away or using any narcotic, rather than to open or maintain to be resorted to by other persons any place in which narcotics are unlawfully sold, given away, smoked or used.” (Legis. Counsel’s Dig., Assem. Bill. No. 2238 (1953 Reg. Sess.) Summary Dig., p. 216.)

The People contend the 1953 amendment that deleted the reference to “other persons” shows the Legislature intended the statute to apply to anyone who maintained a place for continuous personal use. We disagree. Neither the 1953 language change nor the Legislative Counsel’s Digest establishes that solo personal use was intended to be included within the scope of former section 11557, much less current section 11366. Although one could draw the inference the People advocate, that is not the only reasonable inference that can be made based on the language change. It is just as likely the amendment sought to streamline the statute and eliminate superfluous wording, including a construction (“to be resorted to by others”) that was awkward and unnecessary. The pre-1953 wording of the precursor statute to section 11366 actually confirms that the Legislature intended to apply the statute to places that are made available to others. If the Legislature had intended to radically change the statute so as to include solo personal use within its scope, then surely it would have indicated as much. Plainly, it did not do so. Therefore, the legislative history relied upon by the People is inconclusive and cannot be the basis for adopting an interpretation of section 11366 that includes repeated, solo use of drugs at home.

If the Legislature believed the *Vera* holding was contrary to its intent, it could have amended the statute in the past ten years. However, the Legislature has not amended section 11366 since the *Vera* decision. When “ ‘ “a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must

be presumed that the Legislature is aware of the judicial construction and approves of it.” [Citation.]’ ” (See *People v. Meloney* (2003) 30 Cal.4th 1145, 1161.) In addition to the lack of legislative reaction to *Vera*, we are aware of no reported decisions criticizing or disagreeing with the decision.

Moreover, when a statute defining a crime is susceptible of two equally reasonable interpretations and it is impracticable to resolve the ambiguity, the “rule of lenity” establishes that a court should ordinarily adopt the interpretation that is more favorable to the defendant. (*People v. Avery* (2002) 27 Cal.4th 49, 57.) Here, to the extent section 11366 is equally susceptible to both the People’s and appellant’s interpretation, we must adopt the view that favors appellant.

Finally, we observe there is nothing in CALCRIM No. 2440 or the notes accompanying the instruction suggesting that section 11366 applies to repeated solo use of drugs at home. The distinction in the instruction between “use” and “allow others to use” does not necessarily indicate that solo personal use falls under section 11366. Rather, there is a distinction between joining other persons in using drugs, and merely allowing others to use drugs at a place one maintains. In both circumstances there is a violation of section 11366. The alternative language simply clarifies that a person violates the statute regardless of whether the person consumes drugs along with others or simply facilitates use by other persons.

Therefore, we conclude that section 11366 does not apply to an individual’s repeated or continuous use of specified controlled substances at home absent evidence that the individual opened his or her home on a continuous or repeated basis to others for the purpose of selling, giving away, or using such substances. The trial court erred in instructing the jury otherwise.

C. Harmless Error Analysis

We turn to the question of whether the error compels reversal of appellant’s conviction.

When instructional error turns on an issue of state law, we assess whether the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818.⁵ (See *People v. Perez* (2005) 35 Cal.4th 1219, 1232.) “ ‘Under *Watson*, reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred.’ [Citation.]” (*Ibid.*)

“The nature of this harmless error analysis depends on whether a jury has been presented with a legally invalid or a factually invalid theory. When one of the theories presented to a jury is legally inadequate, such as a theory which ‘ ‘fails to come within the statutory definition of the crime’ ’ [citation], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless ‘it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.’ [Citation.]” (*People v. Perez, supra*, 35 Cal.4th at p. 1233; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1128; *Griffin v. United States* (1991) 502 U.S. 46, 59.) By contrast, a different standard of review applies when one of the theories presented to the jury is factually inadequate, such as when a theory that, while legally correct, is inapplicable to the facts of the case. (*People v. Perez, supra*, 35 Cal.4th at p. 1233.) In such a case, a reviewing court “will affirm ‘unless a review of the entire record affirmatively demonstrates a reasonable

⁵ Appellant also argues that the instructional error violated his federal constitutional rights to the extent the court failed to properly instruct the jury on an essential element of the offense. In such cases, we review the error under *Chapman v. California* (1967) 386 U.S. 18. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Under *Chapman*, an appellate court may find the error harmless only if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Chapman, supra*, 386 U.S. at p. 24.) Because we conclude the error was not harmless even under the *Watson* test, there is no need to determine whether the instructional error should be assessed under the more stringent *Chapman* test as a consequence of a purported violation of appellant’s federal constitutional rights.

probability that the jury in fact found the defendant guilty solely on the unsupported theory.’ [Citation.]” (*Ibid.*)

The error here involved the presentation of a legally inadequate theory to the jury, i.e., that appellant could be convicted upon a showing that he used controlled substances in his home on a repeated or continuous basis. Reversal is required because there is nothing in the record to establish that the jury necessarily rejected that theory and instead convicted appellant on a proper theory.

A review of the record tends to indicate the jury convicted appellant of violating section 11366 based upon an improper theory. The jury specifically questioned the judge whether a conviction could be based upon an individual’s personal drug use. There would have been no need to ask the question if the jury had been satisfied that appellant sold drugs out of his home on a repeated basis. Further, by appellant’s own admission, he used heroin three to four times a day, and the implication from the testimony was that he did so in his home. The jury had ample grounds to conclude appellant personally used heroin on a repeated and continuous basis in his home. By contrast, there was no substantial evidence that he sold heroin out of his home on a repeated and continuous basis, as explained below. The record does not indicate anyone other than appellant used heroin in the home. Thus, at a minimum, we cannot rule out the possibility the jury convicted appellant on the basis of an invalid legal theory.

Because the error was not harmless, appellant’s conviction for violating section 11366 must be reversed.⁶

II. SUBSTANTIAL EVIDENCE

Although we have concluded the conviction for maintaining a place for the sale or use of drugs must be reversed, we must nonetheless assess the sufficiency of the evidence to determine whether appellant may again be tried for the offense upon a proper legal theory. (See *People v. Morgan* (2007) 42 Cal.4th 593, 613; *Burks v. United States* (1978)

⁶ Because we reverse appellant’s conviction on this ground, we need not address appellant’s contention that the trial court erred by failing to instruct the jury that it must unanimously agree on the theory supporting his conviction.

437 U.S. 1, 16-18 [double jeopardy bars retrial after appellate finding of insufficient evidence].) We conclude the evidence is insufficient to support a conviction under section 11366, thus barring retrial on the charge.

“ ‘In reviewing the sufficiency of the evidence, we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ [Citation.] ‘Substantial evidence’ is evidence which is ‘ “reasonable in nature, credible, and of solid value.” ’ [Citation.]” (*People v. Morgan, supra*, 42 Cal.4th at pp. 613-614.)

Section 11366 “is aimed at places intended to be utilized for a continuing prohibited purpose, and a single or isolated instance of misconduct does not suffice to establish a violation. [Citations.]” (*People v. Vera, supra*, 69 Cal.App.4th at p. 1102.) To support a conviction for violating section 11366, the People must prove a series of events—coupled with surrounding circumstances, such as a large quantity of illicit drugs, the containers in which the drugs are kept, the character of the premises, the use of passwords in gaining access to the premises, and evidence of people visiting the premises in unusual numbers or at unusual times—that reasonably raise the inference that the premises were maintained for the purpose of selling, giving away, or using illicit drugs. (*People v. Horn* (1960) 187 Cal.App.2d 68, 73.)

The discussion in *People v. Shoals, supra*, 8 Cal.App.4th 475, is illustrative. In that case, a search of the defendant’s motel room revealed 21 small baggies of cocaine base, a pager, and \$533 in cash. (*Id.* at p. 481.) The Court of Appeal concluded this evidence did not support the defendant’s conviction for maintaining the motel room for the purpose of selling cocaine base. This was so because the evidence showed that the motel room was used as a bedroom and a “home for a woman, possibly a man, and children,” “there was no evidence of people visiting the place in unusual numbers or at unusual times,” there was “no evidence of people under the influence on or around the premises,” “there was no evidence of lookouts or of the use of passwords or codes to gain access,” and “there was no drug paraphernalia or drug residue in the room.” (*Id.* at p. 492.)

The evidence relied upon by the People here is insufficient to support a conviction under section 11366. The People cite the quantity of heroin found in appellant's room, the presence of a scale and baggies, and the fact appellant made a sale to Simpson while the police waited to enter the hotel room. While this evidence supports a conclusion that appellant possessed heroin for sale, it does not suffice to establish that appellant sold heroin on a continuous and repeated basis *in his hotel room*. Because narcotics and packaging materials are "extremely portable," the mere existence of a large quantity of narcotics along with packaging materials does not give rise to a presumption that the narcotics were sold in the location where they were found. (*People v. Shoals, supra*, 9 Cal.App.4th at p. 492.)

Although there was evidence of a sale to Simpson, a single, isolated sale does not support a finding that appellant maintained a place for drug sales or use. (See *People v. Horn, supra*, 187 Cal.App.2d at p. 73; *People v. Holland* (1958) 158 Cal.App.2d 583, 588-589.) Here, there were no indicia that appellant repeatedly and continuously made such sales out of his home. There was no evidence that anyone other than Simpson visited appellant in his home. There was also no evidence of the use of lookouts or passwords showing an attempt to restrict access to potential customers. Furthermore, there was no evidence that anyone other than appellant had used heroin in his home.

Accordingly, the evidence was insufficient to support appellant's conviction for violating section 11366.

III. PRISON SENTENCE AS CRUEL AND UNUSUAL PUNISHMENT

Appellant contends that committing him to prison violated federal and state constitutional guarantees against cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) He argues that health care provided in the state's prison system is constitutionally inadequate and that the California Department of Corrections and Rehabilitation (CDCR) is incapable of providing the specialized medical care he requires. Appellant's claim fails.

A. Background

Before the sentencing hearing, appellant filed a motion claiming that transferring him to the state prison system would violate the constitutional prohibition against cruel and unusual punishment because of the inability or unwillingness of the CDCR to provide adequate medical care. Appellant requested either a probationary sentence or commitment to a facility other than one operated by the CDCR.

In support of the motion, Dr. Michael Chiarottino testified that appellant suffered from a chronic kidney condition progressing toward renal failure, asthma, hepatitis C, high cholesterol, and chronic anemia. Appellant's kidney disease was at "stage five," which is called "end-stage renal failure." Dr. Chiarottino opined that appellant was in need of kidney dialysis or a kidney transplant. Given the virtually non-existent chance that appellant would receive a kidney transplant, Dr. Chiarottino stated appellant's only option to stay alive was to receive dialysis, which would be required three days a week for five hours a day.

Appellant based his motion to preclude transfer to state prison on findings of fact and conclusions of law articulated by the federal district court in *Plata v. Schwarzenegger*,⁷ in which the court determined the CDCR had failed to provide constitutionally adequate medical care. The trial court took judicial notice of the federal district court's findings and conclusions of law.

Dr. Chiarottino testified that he had read the findings of fact and conclusions of law in *Plata v. Schwarzenegger*. Based on that review, as well as his consideration of a report prepared by the receiver appointed to oversee the prison health care system, he expressed an opinion that appellant's kidney disease would progress unabated and appellant would die if he were committed to prison. Dr. Chiarottino acknowledged he had no special knowledge about what is done to treat dialysis patients in the California prison system.

⁷ *Plata v. Schwarzenegger* (N.D. Cal. Oct. 3, 2005, No. C01-1351) 2005 WL 2932253.

The trial court denied appellant's motion, concluding it was "premature and without evidentiary foundation." The court noted there was no evidence that appellant "has been or will be denied [adequate] care for his various medical conditions" that would rise to a level of "deliberate indifference" required to establish an Eighth Amendment violation.

B. Analysis

Appellant sought to receive a grant of probation or to be committed to a facility other than one operated by the CDCR. The court lacked power to grant either option. Appellant was statutorily ineligible for probation as a result of a prior conviction. (See § 11370, subd. (a) [probation "shall not" be granted "in any case" in which statute is satisfied]; cf. Cal. Rules of Court, rule 4.413(b) [even when probation prohibited, it may be considered in "unusual" cases if statute expressly allows such an exception].) Thus, the court had no authority to grant probation.

The court also lacked jurisdiction to commit appellant to the custody of anyone or any entity other than the CDCR. Penal Code section 1202a provides that a judgment imposing a prison sentence "shall" direct delivery of the defendant to the custody of the CDCR. Under Penal Code section 1216, the sheriff is required to deliver a defendant who receives a prison sentence to the warden of the state prison designated by the Director of the CDCR. It is well settled that the trial court has no authority to deviate from these statutory mandates. (*People v. Mendosa* (1918) 178 Cal. 509, 511 [no authority to suspend execution of state prison sentence and remand to local custody]; *People v. Thomas* (1976) 65 Cal.App.3d 854, 858 [no jurisdiction to specify detention in a particular facility].)

Appellant contends the trial court had authority under Penal Code section 1203.03 to order a diagnostic evaluation of appellant before sentencing, suggesting this statute permits a court to avoid delivering a defendant sentenced to state prison to the CDCR. Appellant's reliance on Penal Code section 1203.03 is unavailing. As an initial matter, the claim is forfeited because it was not timely raised. The question of whether to order a diagnostic evaluation is within the discretion of the trial court. (See Pen. Code,

§ 1203.03, subd. (a).) A challenge to a discretionary sentencing decision may not be raised for the first time on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 356-357.) Here, appellant first raised a claim regarding Penal Code section 1203.03 in his reply brief on appeal. He has thus forfeited any right to challenge the discretionary decision not to conduct a diagnostic evaluation.

Further, Penal Code section 1203.03 would not have authorized the form of relief appellant sought in his motion. Even if a diagnostic evaluation had been performed, appellant still would have been statutorily ineligible for probation. Thus, he would have necessarily received a prison sentence, regardless of the recommendations of the diagnostic evaluation. Penal Code section 1203.03 does not give the court authority to avoid the dictates of Penal Code sections 1202a and 1216 requiring delivery of the defendant to the CDCR in a case in which a prison term has been imposed.

Appellant contends the trial court had the authority to overlook the statutory requirement of delivery to the CDCR because the evidence before the court demonstrated he would be subjected to cruel and unusual punishment if committed to an institution run by the CDCR. This case presents no occasion for us to consider whether an order contravening Penal Code section 1202a and 1216 could be justified based upon a sufficient factual showing that application of these statutes would constitute a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. As the trial court concluded, no such factual showing was made below.

“[D]eliberate indifference to serious medical needs of prisoners” constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105.) As the trial court observed, prison officials cannot be found to be deliberately indifferent unless they know or have reason to know of a inmate's serious medical condition. Because appellant had yet to be committed to the CDCR at the time of his motion, he had not been received by the CDCR or received a medical evaluation at a prison facility. Thus, there was no showing that the CDCR knew or should have known of appellant's medical condition, much less that the CDCR would be deliberately indifferent to his medical needs.

Appellant relies almost exclusively on the findings in *Plata v. Schwarzenegger*, as supplemented by a report from the receiver appointed to oversee the prison's health care system. The findings concerning the general state of medical care in the CDCR, as set forth in *Plata v. Schwarzenegger*, a civil class action, may not be read to support the conclusion that all persons with serious medical problems such as appellant will in fact receive constitutionally inadequate medical care and thus avoid commitment to the CDCR. (See, e.g., *People v. Superior Court (Himmelsbach)* (1986) 186 Cal.App.3d 524, 534-535 [trial court conclusion that prison sentence would constitute cruel and unusual punishment because of risk defendant would be preyed upon by other inmates was unsubstantiated], disapproved on another ground in *People v. Norrell* (1996) 13 Cal.4th 1, 7, fn. 3.)

The CDCR is required to provide necessary medical treatment for prisoners. (3 Witkin, Cal. Criminal Law (3d ed. 2000) Punishment § 63, p. 107.) One cannot assume the CDCR will violate its obligation to provide adequate medical treatment in any particular case. The fact that there are many documented instances of inadequate care does not establish that a particular prospective inmate, such as appellant, will receive constitutionally deficient medical care.

Although Dr. Chiarottino offered the opinion that appellant's kidney disease would continue unabated and that appellant would eventually die if he were committed to prison, he based this opinion on generalities about the prison health care system contained in the findings of fact from *Plata v. Schwarzenegger, supra*. He had no way of knowing whether appellant would in fact receive inadequate care upon commitment to the CDCR. Further, there is no indication appellant's condition would be any different if he were placed on probation or committed to county jail or some other non-CDCR facility. Despite Dr. Chiarottino's conclusion that appellant needed dialysis to survive, he acknowledged there was no indication appellant had ever received dialysis, including while appellant was free from custody.

If appellant does, in fact, receive constitutionally inadequate medical care in prison, he has remedies to address such a claim. (See *Estelle v. Gamble, supra*, 492 U.S.

at pp. 104-105 [deliberate indifference to prisoner’s serious medical condition states civil rights cause of action under 42 U.S.C. § 1983].) For example, he may seek of writ of habeas corpus challenging the conditions of his confinement. (*In re Alcala* (1990) 222 Cal.App.3d 345, 352, fn. 4.) It is premature to consider any such claims until appellant has actually suffered a violation of his constitutional rights. While it may be true, as appellant claims, that “imminent injury” is enough to afford standing to seek relief for a constitutional violation, appellant has not shown any such imminent injury. At most, he has demonstrated the *possibility* the CDCR may provide him inadequate medical care in the future, a showing that is insufficient to justify the relief he seeks.

We conclude the trial court did not err in denying appellant’s motion seeking to avoid transfer to the CDCR.

DISPOSITION

Appellant’s conviction for violating Health and Safety Code section 11366 is reversed, and the concurrent term imposed with respect to that conviction is vacated. The trial court is directed to amend the abstract of judgment accordingly and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.